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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

No. 12-II06

April 10, 2012

REQUESTED BY:

Martha Lou Cochran 1004 Scarborough Avenue, Extended Rehoboth Beach, Delaware	Mary R. Sharp 1002 Scarborough Avenue, Extended Rehoboth Beach, Delaware	Elizabeth B. Stiff 1007 Scarborough Avenue, Extended Rehoboth Beach, Delaware
Sallie H. Forman, President Save Our Lakes Alliance3 P.O. Box 1504 Rehoboth Beach, Delaware	Joseph J. Filipek, Officer Silver Nine LLC 2 Silver Lane Rehoboth Beach, Delaware	Charlie Brown, President Rehoboth Beach Homeowners' Association P.O. Box 41 Rehoboth Beach, Delaware

OPINION BY:

Kent Walker, Deputy Attorney General
Delaware Department of Justice

and

Lawrence W. Lewis, State Solicitor
Delaware Department of Justice

OPINION:

The persons and organizations listed above have requested by letter that we investigate their allegations of the violation by the Rehoboth Beach Board of Adjustment (the "Board") of the Delaware's Freedom of Information Act, 29 Del. C. ch. 200 ("FOIA") at the Board's meeting on January 30, 2012.

PETITIONS

In accordance with 29 *Del. C.* §10005 (e), we are treating these letters as petitions for a determination as to whether FOIA was violated by the Board at that meeting ("Petitions").

By letter of February 21, 2012 we referred the Petitions to Craig A. Karsnitz, Esquire, legal counsel to the Board for its response.¹ Mr. Karsnitz, by letter dated February 28, 2012 replied, contending that the Board had fully met its obligations under FOIA and that the conduct by the Board of its meeting, once proper FOIA notice for the meeting had been given, was in the discretion of the Board and was not a matter within the purview of FOIA or the jurisdiction of the Attorney General.

After thorough review of the Petitions, the Notice and Agenda for the meeting and the response of the Board to the Petitions, we conclude that no FOIA violations occurred.

ALLEGATIONS

The Petitions make virtually identical allegations that (1) the notice and agenda for the January 30th meeting violated FOIA, §10004 in that they failed to inform the public that the Board would bifurcate its deliberations into two stages, first, whether the petitioners' appeal was time barred and second, the merits of the appeal, and (2) the Board violated various procedural requirements of 22 *Del. C.* § 324, the City's *Code*, presumably Article VIII, and the Board's own procedures.

¹ Ms. Cochran submitted a follow-on petition by letter dated February 28, 2012 asking us to determine whether an alleged ex parte communication between the building inspector and the Chairman of the Board violated FOIA. Mr. Karsnitz responded to that petition by letter dated March 21, 2012. Because FOIA does not address the meeting procedures of Public Bodies, except with respect to Executive Sessions and video-conferencing, we find that those conversations did not violate FOIA.

ANALYSIS

Alleged FOIA Agenda Violations

The allegations of FOIA violations are limited to whether the notice of the meeting and its agenda were sufficient and whether the conduct of the meeting met FOIA requirements. The Petitioners apparently concede that the notice and agenda were timely posted and the meeting properly convened.

The content of a meeting agenda under FOIA is governed by the definition of that term at 29 *Del. C.* § 10002 (a):

"Agenda" shall include but is not limited to a *general statement* of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor under subsection (b) of § 10004 of this title." [Emphasis added.]

The January 30, 2012 meeting Agenda listed as its sole New Business item the following, which is the ultimate subject of the petitioners' complaints:

"A. Case No. 1111-08. An APPEAL OF THE DECISION OF THE BUILDING INSPECTOR in regard to Section 270-82 of the Municipal Code of Rehoboth Beach to issue a building permit for residential construction. The property is located in the R-1 Zoning District on Lot 6, Silver Lake Shores at 6 Silver Lane. The Appeal is being requested by Eugene M. Lawson, Jr., Esq. of The Lawson Firm LLC on behalf of Silver Nine, LLC, Martha Lou Cochran, Save Our Lakes Alliance 3 and Rehoboth Beach Homeowners' Association Inc. The property is owned by the Joseph & Veda Levy Trust."

The petitioners contend that this paragraph did not give them adequate notice that the timeliness of their appeal would be considered and decided. We disagree. The issue is their appeal. Whether or not that appeal was timely taken certainly is within the scope of the appeal itself. If the appeal was not timely taken and no adequate reason for the

delay was given, as the Board determined, then the appeal may be dismissed, as it was by a majority vote.²

The petitioners' contention that the conduct of the meeting itself violated FOIA because they were not allowed to comment is wholly without merit. As our Court of Chancery has observed:

“Although FOIA entitles citizens to notice of public meetings and to attend meetings of public bodies, FOIA does not mandate that public bodies allow for public comments at any or all meetings. There is nothing in the text of the declaration of policy or the open meeting provision requiring public comment or guaranteeing the public the right to participate by questioning or commenting during meetings. What is provided by FOIA generally, and by the open meetings provision in particular, is public access to attend and listen to meetings. Moreover, should a public body permit the public to comment, there is no requirement in FOIA that an unlimited or extended period of time must be provided to each citizen nor that public bodies permit the public to question their individual members.” *Reeder v. Dept. of Insurance*, 2006 Del. Ch. LEXIS 46, 11-12. [Footnotes omitted.]

While the Board, apparently, did not allow the petitioners to comment on the issue of timeliness, it did hear argument from their counsel, as well as counsel for the City of Rehoboth Beach and counsel for the affected property owners. We conclude that permitting these arguments met any standards of fairness that FOIA and the First Amendment to the United States Constitution may require.

Alleged Procedural Violations

The procedures of the Board are governed by 22 *Del. C.* §§ 321 et seq., *Rehoboth Beach City Code*, §§ 270-70 – 270-79 and the Rules of Procedure adopted by the Board. These procedural rules provide for appeals to the Board from decisions, as here, of

² See the Agenda for the January 30, 2012 meeting and the Minutes of that meeting, as adopted by the Board at its March 19, 2012 meeting, may be found at <http://www.cityofrehoboth.com/index.cfm?fuseaction=content.pageDetails&id=1511&typeID=153>

building inspectors and appeals from decisions of the Board to Superior Court. So long as meetings are properly noticed and proper agenda posted and if, as here, neither an executive session nor video-conferencing was proposed or conducted, FOIA has nothing to say about Board conduct of its meetings. The interpretation and application of these rules are the province of the Board and its legal counsel, not the Attorney General. And interested parties dissatisfied with Board procedures and decisions have specific recourse to Superior Court, not under FOIA to the Attorney General. *See 22 Del. C. § 328.*³

CONCLUSION

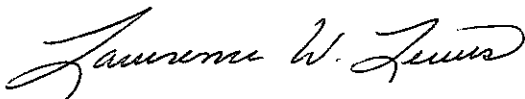
The Attorney General concludes that no violation of FOIA agenda requirements occurred with respect to the Board meeting on January 30, 2012 and that no issue governed by FOIA has been raised concerning the conduct of that meeting.

Very truly yours,



Kent Walker
Deputy Attorney General

Approved:



Lawrence W. Lewis
State Solicitor

³ Petitioners moved for a rehearing on the denial of their appeal, which motion the Board refused by a majority vote at its meeting on March 19, 2012.